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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 UNITED STATES OF AMERICA,

4 v.

20 Cr. 182 (VEC)

5 JONATHAN BURGOS,
6 a/k/a "John John,"

7 Defendant.

Conference

8
9 New York, N.Y.
August 16, 2021
10 2:30 p.m.

11 Before:

12 HON. VALERIE E. CAPRONI ,

13 District Judge

14 APPEARANCES

15 AUDREY STRAUSS

16 United States Attorney for the
Southern District of New York

17 BY: MICAH F. FERGENSON

SAMUEL P. ROTHSCHILD

18 MICHAEL K. KROUSE

Assistant United States Attorneys

19 RUHNKE & BARRETT

20 Attorneys for Defendant

21 BY: DAVID A. RUHNKE

-and-

22 DIANE FERRONE

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1 (Case called; appearances noted)

2 THE COURT: Good afternoon.

3 OK. We're here for the final pretrial conference in
4 this case. Let me tell you what we're going to talk about. We
5 will talk about my general trial procedures. We'll talk about
6 your *in limine* motions and I'll answer any questions that the
7 parties have.

8 We're starting trial on August 23 at 10:00. I'm going
9 to ask you to all be in our designated courtroom, which is 26B,
10 as in boy, by 9:45 that morning. As soon as we get a jury
11 ready, we'll go down.

12 Let me come back to how jury selection works now.

13 Are we still estimating that your trial is going to be
14 three days?

15 MR. ROTHSCILD: That's correct, your Honor.

16 THE COURT: We'll sit from 9:30 until five. Have
17 enough witnesses to fill up the day. I usually do not sit on
18 Friday. If we're still talking about Friday, that means your
19 case is going in much slower than you anticipate so we probably
20 will sit Friday because that means I'm going to be getting
21 antsy to get finished with this case, unless something really
22 has gone wrong and you've got a whole trial day, and then I'll
23 kick that over to Monday. But I'll keep you posted.

24 If the lawyers know that there's some issue that's
25 going to come up during court that day, please be in the

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1 courtroom early. Tell Angela you've got an issue that needs to
2 be discussed. I'll come out early. My goal is to have jurors
3 in the box at 9:30. So please, if there's stuff that we can
4 resolve before 9:30, let Angela know. I'll come out and we'll
5 resolve it.

6 This is not really much of an issue now in the new
7 courtrooms because hopefully everything that you've got you've
8 got electronically so you can show the witness an exhibit
9 electronically rather than handing him a hard copy. But if for
10 some reason you have to hand a witness something, you do not
11 need my permission to advance, to approach the witness, but
12 please get back behind the podium. You really are going to
13 have to do that, because --

14 Has anybody tried a case in the outfitted courtrooms?

15 Seeing head shakes all around.

16 OK. I encourage you to walk over and see how they're
17 outfitted. There's a Plexiglas box that is built over the
18 witness stand which has a HEPA filter in it. There's also a
19 Plexiglas box which is over the lawyer's podium, which also has
20 a HEPA filter in it. You have to stay behind the podium if you
21 want to take your mask off, and we want you to take your mask
22 off because otherwise it's difficult to understand exactly what
23 you're saying. But that means you have to say in the box. So
24 you're welcome to put a mask on, approach the witness but then
25 get back into the box, where you can take your mask back off.

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1 You have to talk, whether you're seated at your table or you're
2 at the podium, you have to talk directly into your microphone
3 or you're not going to be heard. Please try to remember that.
4 Trust me, I will remind you.

5 You need to stand when you're addressing me or the
6 witness and when the jury enters or exits.

7 Do not make speaking objections. If I need, you can
8 give me a one word, "hearsay," "no foundation," whatever. But
9 if I need argument, I'll bring you to the sidebar to hear it.

10 OK. In terms of jury selection, the jury selection
11 takes place in the central jury room so that the jurors all
12 have enough space between their chairs. They will be masked
13 throughout. You have to be masked as well. There's a table
14 for the government. There's a table for the defense.

15 I use a struck system, so this means I need to qualify
16 28 jurors to get there. I'll do the voir dire. We'll deal
17 with strikes for cause as we go, but if somehow I've rushed
18 past you and you have a strike for cause, let me know before we
19 take peremptories, which you want to revisit whether there's a
20 legitimate strike for cause for one of the jurors. For your
21 peremptories, we'll do it in rounds so you don't have to waste
22 any of your strikes. The government goes first in the odd
23 rounds, so one and three. The defense goes first in the even
24 rounds, two and four. The government gets two strikes in
25 rounds one and two. The defense gets three. The government

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1 gets one strike in rounds three and four, and the defendant
2 gets two. Don't feel like you have to memorize that. Trust
3 me, I will tell you on each round who goes first and how many
4 strikes you have.

5 If a strike is waived, so we end up, after all the
6 strikes are taken, with 13 jurors, the highest numbered juror
7 becomes the first qualified alternate. For alternates, I'm
8 only going to take two given how short the trial is. That
9 means I need to qualify four jurors who each get one strike.
10 The remaining are your alternates. If you waive a strike, I'll
11 keep the extra alternate. OK?

12 MR. RUHNKE: Question, your Honor. Are counsel
13 directed to use strikes only against the 12 potential jurors in
14 the box or anywhere in the panel?

15 THE COURT: No. That's a box system. On a struck
16 system, I am going to qualify 28 jurors.

17 MR. RUHNKE: Yes.

18 THE COURT: You can strike any one of them.

19 MR. RUHNKE: OK.

20 THE COURT: Whoever is left standing --

21 MR. RUHNKE: 12.

22 THE COURT: -- that's the jury.

23 MR. RUHNKE: Thank you, your Honor. There are just
24 several different ways of doing that. Yes. Thank you.

25 THE COURT: That's how I do it.

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1 OK. I will allow the jury to take notes. I will not
2 allow them to ask questions.

3 OK. That brings us to voir dire. Before I get going
4 on voir dire, do we have any -- are there going to be any
5 Spanish-speaking witnesses, witnesses who are testifying in
6 Spanish?

7 MR. ROTHSCHILD: No, your Honor.

8 MR. RUHNKE: Your Honor, there will be recordings
9 played, parts of which are in Spanish, so that question's going
10 to be appropriate.

11 THE COURT: So there are some audio recordings where
12 there's Spanish in them?

13 MR. ROTHSCHILD: That's correct, your Honor.

14 THE COURT: OK. Then I'm going to add a question to
15 the voir dire that deals with whether the person speaks
16 Spanish. If they say yes, then my follow-up will be will you
17 comply with my direction to consider only the official
18 translation of the Spanish. So I'll add that question.

19 All right. Other than that, are there any other
20 questions, any objections to the proposed voir dire that I've
21 given you or any of your favorite questions that I did not
22 take?

23 MR. RUHNKE: Your Honor, the latter.

24 THE COURT: OK.

25 MR. RUHNKE: Not a favorite question, but in this

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1 case, as your Honor may gather, police credibility is more
2 important than it is in, maybe, other cases since we have this
3 whole issue of an officer lying, our perspective, about an
4 important issue, and we have asked for specific questions on
5 our proposed voir dire. We would ask you to ask our questions
6 8 and 9. I'm sorry. Not questions 8 and 9. That's your
7 question.

8 Our questions are -- I'll come to it in that a second.
9 I need a second.

10 THE COURT: Sure. Take your time. I've got all
11 afternoon.

12 MR. RUHNKE: OK. Thank you.

13 OK. I'm sorry. It is question 8 and 9 under our
14 case-specific questions. Question 8 says: "Many of the
15 witnesses you will hear are members of law enforcement. Do you
16 believe that law enforcement witnesses are generally more or
17 less credible than nonlaw enforcement witnesses?" And the next
18 question is really the more important of the two: "Do any of
19 you believe that a law enforcement witness would never tell a
20 deliberate lie under oath, during a trial or elsewhere?"

21 That's an important question to us. And that's all I
22 did have on the issue of voir dire, your Honor.

23 THE COURT: Mr. Rothschild.

24 I'm not crazy about the wording of the question. I
25 hear you in terms of this being a little unusual and that it's

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1 slightly different than the normal "let's bash the cops" type
2 of defense.

3 MR. ROTHSCILD: One moment, your Honor?

4 THE COURT: Sure.

5 MR. ROTHSCILD: Your Honor, on the first question, I
6 think the spirit of the question seems fine. Perhaps we can
7 work on wording, the parties can work out the wording.

8 On the second question, if I could that the Court
9 maybe just ask the defense to repeat that. I'm not sure I
10 captured the entire second question.

11 THE COURT: The question that Mr. Ruhnke wants
12 added -- again, I don't like the wording of his, but the
13 concept is his question No. 9, which is on page 3. As he's
14 requested it, it reads: "Does any potential juror believe that
15 a law enforcement witness would never tell a deliberate lie
16 under oath, during a trial or elsewhere?"

17 That can be wordsmithed, but the idea would be do you
18 believe that law enforcement officers never intentionally lie
19 in their testimony?

20 MR. RUHNKE: As your Honor rephrases it, that would be
21 acceptable. Thank you.

22 THE COURT: It would probably make it even better.
23 Think about it.

24 MR. ROTHSCILD: That's fine, your Honor.

25 THE COURT: OK. We'll add something along those

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1 lines.

2 Anything else, Mr. Ruhnke?

3 MR. RUHNKE: Nothing on jury selection, your Honor,
4 no. Thank you.

5 THE COURT: OK.

6 How about from the government?

7 MR. ROTHSCHILD: No, your Honor. Thank you.

8 THE COURT: OK. So with the addition of those two
9 questions, one about law enforcement's deliberately lying, and
10 second about Spanish-speaking, you have your voir dire
11 questions.

12 And the way I do this is I just pass out the
13 questionnaires at some point after I introduce myself and after
14 I introduce you. I encourage them to keep notes. I read all
15 the questions once to juror No. 1. After that I'm only asking
16 for "yes" answers, and that makes it go pretty fast.

17 From a timing perspective, Covid makes things a little
18 bit different, and this is a narcotics case, which typically
19 takes a little bit longer to pick a jury. But I can usually
20 get a jury by lunch. So be prepared to start to open and have
21 your first witness on after lunch. OK?

22 MR. RUHNKE: Yes, your Honor.

23 THE COURT: OK. I also gave you the proposed, the
24 portion of my pre-charge, after the jury was selected, that
25 deals with the substantive law. This is not intended to be a

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1 complete jury charge, but it is intended to give them some
2 sense of what they're going to be asked to decide once they're
3 fully charged and have heard all the evidence.

4 Any objections to the proposed preliminary charge?

5 MR. ROTHSCILD: Not from the government.

6 MR. RUHNKE: Not from the defense, your Honor, no.

7 THE COURT: Terrific. That's done.

8 OK. Government, I'm going to ask you to give the
9 defense the order of witnesses for the next day each day, so at
10 the end of the day, tell who are going to be your witnesses for
11 the following today.

12 That brings us to the motions *in limine*.

13 The first one deals with whether the government can
14 have its witnesses testify that there was an overdose. Would
15 the government like to be heard?

16 I've read all your papers. Do you want to be heard
17 further?

18 MR. ROTHSCILD: Just briefly, your Honor.

19 We think that provides important context for how this
20 investigation got started and also for the behavior of the
21 defendant. We think it's difficult to capture that without
22 using the word "overdose." We think that the case comes in
23 more cleanly, more completely and in a more understandable way
24 for the jury if we're able to refer to that word.

25 THE COURT: Mr. Ruhnke.

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1 MR. RUHNKE: I believe that the evidence, your Honor,
2 respectfully, it's my position that the evidence that the
3 government wants to present can be presented with no mention of
4 a drug overdose. I outlined a way to do that in my papers,
5 where the government can say there was an investigation, during
6 the investigation certain evidence was gathered, and this is
7 the evidence that was gathered during that investigation, and
8 leave it at that.

9 It's bad enough to be charged with narcotics. To
10 suggest that somehow, and the government has said they're not
11 going to try to prove that Mr. Burgos is responsible for these
12 drugs, but to introduce the idea that people are overdosing on
13 drugs introduces the unfair element of prejudice to the case,
14 and I believe it can be presented as outlined in the papers
15 without any reference at all to an overdose. I accept the
16 government's representation that they will not introduce the
17 fact that there were overdose deaths, but even without the idea
18 that people died, the idea of an overdose, to me, is unfairly
19 prejudicial, and we ask that your Honor not allow the
20 government to do that.

21 THE COURT: OK. My view on this is that, in the
22 abstract, the fact that there was an overdose would not lead
23 the jury to conclude that there was an overdose death, but the
24 fact of that witness's never testifying, I think, could lead a
25 reasonable juror to conclude that the overdose was actually a

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1 death, which makes this a very close call on 403.

2 I, like Mr. Ruhnke, though not necessarily adopting
3 his suggestion of how to do it, believe that with a reasonable
4 stipulation the parties, the government can get what the
5 government wants without actually having discussion of there
6 being an overdose. Again, my thoughts, and you know the
7 evidence in this case, and I don't -- I mean I know a little
8 bit of it, but not really -- is that victim No. 1 was, it would
9 be a stipulation. So it would just take all of this out of the
10 case beyond what your police officer's going to testify, that
11 victim No. 1 was a cocaine user from at least X date to Y date;
12 that the police acquired victim 1's telephone lawfully on a
13 particular date; that victim 1 lived at that address from at
14 least date one to date two; and that victim 1 is not available
15 to testify at trial.

16 Now, the government wants to get in somehow or another
17 that there was an investigation, the overdose providing a
18 jumping-off place for there being an investigation, but it
19 seems to me that you can wrap that in to this as well, as part
20 of the investigation of victim 1's drug use. I don't know how
21 you would phrase it, but something along those lines.

22 MR. RUHNKE: Your Honor, without using the term
23 "victim 1," it would be individual 1.

24 THE COURT: It would probably be his name.

25 MR. RUHNKE: Yes.

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1 THE COURT: But I don't know his name, and so I'm
2 going with how you've briefed it. So I'm going to ask you to
3 work on that.

4 Mr. Ruhnke, I'm going to hammer on you to being
5 reasonable, because this is not a slam dunk on the 403. So if
6 you can't work out a reasonable stipulation and what I see you
7 is you being unreasonable, then I'm going to allow them to put
8 in what they want to put in.

9 MR. RUHNKE: I don't think you have to worry about
10 that, your Honor. We've been discussing a stipulation.

11 THE COURT: I don't think so either, but just --

12 MR. RUHNKE: I take your meaning.

13 THE COURT: OK.

14 MR. RUHNKE: Leave it at that.

15 THE COURT: See what you can work out. If you can't
16 work out what you need to work out by the end of the week, let
17 me know.

18 MR. RUHNKE: Yes, your Honor.

19 THE COURT: The second motion *in limine* is the issue
20 of coconspirator statements. And my notes are too cryptic for
21 me to remember exactly what it was.

22 MR. ROTHSCILD: Your Honor, I'm not sure if there's
23 much disagreement between the parties on that issue. I think
24 the defendant's response to that had been so long as the other
25 foundational elements are laid, we're OK there. But I'll let

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1 the defense correct me if I'm wrong.

2 THE COURT: Is that right, Mr. Ruhnke?

3 MR. RUHNKE: That's right, your Honor. The government
4 has to lay the foundation. After they lay the foundation, it
5 comes in. It's the application of *U.S. v. Bourjaily*, and
6 that's all it is. Excuse me for saying this, but there's
7 nothing unique about it. It's not a case of *Bourjaily nouveau*.

8 THE COURT: Oh, Jesus.

9 MR. RUHNKE: Excuse me.

10 THE COURT: OK. So that motion *in limine* is granted.
11 Assuming that the proffer bears out in terms of what the
12 evidence actually is, the statements are admissible as
13 coconspirator statements.

14 The possession of crack on the day of arrest is mooted
15 by the superseding indictment, so that motion is granted.

16 Then we get to the 2016 drug sales and arrest.

17 Mr. Rothschild, do you want to be heard on that?

18 MR. ROTHSCILD: Just very briefly, your Honor.

19 The government thinks that this is clearly admissible
20 404(b) evidence. It's relatively close in time. It's very
21 close in geographical location, very similar conduct and to the
22 extent that the defense in this case is going to be that the
23 drug paraphernalia found in the defendant's bedroom this time
24 around was not there for distribution purposes, the fact that
25 similar circumstances occurred just a few short years earlier,

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1 we think, is quite relevant.

2 THE COURT: Before you start talking, Mr. Ruhnke, am I
3 correct that in 2016 a gun was recovered?

4 MR. ROTHSCHILD: That's correct, your Honor. In 2016,
5 a firearm was recovered as well as two air rifles and
6 ammunition.

7 THE COURT: Hang on a second.

8 Have you been vaccinated, Mr. Burgos?

9 THE DEFENDANT: No.

10 THE COURT: Keep your mask over your nose. Don't make
11 me have to tell you again.

12 THE DEFENDANT: Yes, your Honor.

13 THE COURT: I also encourage you to get vaccinated.

14 THE DEFENDANT: OK.

15 THE COURT: OK. Regardless, you have to keep your
16 mask over your nose.

17 THE DEFENDANT: Not a problem.

18 THE COURT: OK.

19 So it was a real gun and BB guns.

20 MR. ROTHSCHILD: It was a real gun and two air rifles,
21 that's correct, your Honor.

22 THE COURT: OK.

23 MR. ROTHSCHILD: As well as ammunition, ammunition for
24 the real firearm as well as other types of ammunition for other
25 types of firearms that were not recovered.

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1 THE COURT: OK.

2 All right. Mr. Ruhnke.

3 MR. RUHNKE: Your Honor, I think we've made our
4 position quite clear on this in our moving papers, in our
5 responding papers, but this is going to be -- the danger is the
6 jury will just take this as propensity evidence, that the
7 government will introduce evidence that, Oh, he was dealing
8 drugs three or four years ago, he must be doing it again. Plus
9 the idea that this would be a vehicle for introducing firearms
10 into this prosecution, a crime with which he is not charged,
11 and there would be no evidence that firearms were involved in
12 this case.

13 I add that this case was resolved, the 2016 case was
14 resolved by a plea to a seventh degree possession of narcotics.
15 That is not a felony-level offense. That's an offense that
16 carries a maximum of one year in prison, and it's a minor drug
17 offense.

18 THE COURT: There must have been some issue with the
19 search; no?

20 MR. RUHNKE: I'm not sure what the --

21 THE COURT: There was a ton of drugs found.

22 MR. RUHNKE: I can tell you what the issue is, your
23 Honor. This was not Mr. Burgos' apartment. He rented a room
24 there. He made statements at the time of his arrest then: I
25 just rent a room here. It's not my drugs. I cut hair. That's

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1 what I do. I'm a barber.

2 And evidence throughout the discovery that there was a
3 little barber chair set up, barber equipment set up, and I'm
4 assuming that the district attorney looked at it and said
5 Burgos is not really a part of this; it's really the people who
6 own the apartment and, you know, he rented a room from. So we
7 may hear some of that again in this trial if you allow it in.
8 But it's a case of minor involvement in a long past drug
9 offense that carries an overwhelming -- what is the limiting
10 instruction that the jury is supposed to apply to firearms?

11 THE COURT: Well, assume the firearms don't come in.

12 MR. RUHNKE: OK.

13 THE COURT: For purposes of this argument.

14 MR. RUHNKE: Then we're left with, well, what's the
15 limiting instruction concerning the fact that he was charged
16 with drugs a few years back? And I have not seen the
17 government propose a limiting instruction, and I respectfully
18 don't know how a jury hearing that evidence wouldn't conclude:
19 Oh, he did it before; look, he's just doing it again.

20 THE COURT: That's always a problem with 404(b).

21 MR. RUHNKE: Yes, it's always a problem, but the
22 particular problem, when they are similar offenses to the
23 offense with which the defendant is tried -- this is not a case
24 of identity. This is nothing that's a signature crime, you
25 know, about dealing drugs.

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1 THE COURT: Well, what's the defense on -- look, one
2 issue is what's the defense for the March possession?

3 MR. RUHNKE: Correct, that the government will not be
4 able to prove this beyond a reasonable doubt. That's our
5 defense, that the evidence is not reliable and sufficient
6 enough.

7 THE COURT: Not that he may have possessed it, but he
8 wasn't intending to distribute it.

9 MR. RUHNKE: Right. There's none of that to it.

10 THE COURT: You're not putting intent at issue.

11 MR. RUHNKE: I'm sorry?

12 THE COURT: You're not putting intent at issue.

13 MR. RUHNKE: No. No, we're not, your Honor. We're
14 not saying, Oh, he possessed it but he was going to use it
15 himself, or anything like that. No, nothing like that.

16 THE COURT: Just this is --

17 MR. RUHNKE: They can't prove this case, your Honor.
18 That's our defense.

19 THE COURT: The cop's lying.

20 MR. RUHNKE: Yes.

21 MR. ROTHSCHILD: Your Honor, if I may just briefly?

22 I think, first of all, your Honor made the point that
23 the concerns that Mr. Ruhnke's raising are present in all
24 404(b) cases, and if that was the reason to keep things out, we
25 would never have 404(b) evidence come in.

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1 The resolution of the 2016 case is not relevant.
2 What's relevant are the facts of the 2016 case.

3 THE COURT: So tell me the facts more. If the defense
4 was enough to push back the prosecutor, the D.A.'s office, that
5 he's just a tenant, he's just a roomer --

6 MR. ROTHSCILD: I'm not sure that that's what
7 happened here, your Honor.

8 So, there were, there was a confidential informant
9 working with the New York Police Department who did controlled
10 purchases from that unit, from that apartment unit, purchased
11 from the defendant, purchased from the defendant's brother.
12 That's what led up to the search warrant. Police went in on
13 the day of the search warrant. It's a two-bedroom apartment.
14 One of the bedrooms is outfitted as a barber shop. There's a
15 barber chair, and there's nothing that makes it look like a
16 bedroom.

17 The other bedroom, by contrast, has a bed and
18 everything else that you'd expect to see in a bedroom. It also
19 has Con Ed bills with this defendant's name, other paperwork
20 with this defendant's name. It's his bedroom, and that's where
21 they find the bulk of the material they recovered: heroin,
22 crack, paraphernalia, baggies, some of the ammunition. They
23 also find other evidence from the living room, from the
24 kitchen, from the hallway closet. So this is the apartment
25 where the defendant was living, where he was selling drugs out

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1 of.

2 Now, we don't know exactly what happened with the
3 case. We suspect that there was an issue with the CI and that
4 that's why the case was resolved in the way that it was, but
5 that's our understanding of the case.

6 The firearms, your Honor --

7 THE COURT: Hang on. Let's not move to the firearms
8 yet.

9 MR. ROTHSCCHILD: OK.

10 THE COURT: How is the government introducing all of
11 this? Are you telling the back -- you're not telling the back
12 story of informant purchases?

13 MR. ROTHSCCHILD: No. No, your Honor. We propose to
14 introduce just the evidence of the search of the apartment that
15 day. We would call one of the officers who was present for
16 that search, who would testify to what he saw and what he
17 recovered from the scene that day.

18 THE COURT: And describe the apartment.

19 MR. ROTHSCCHILD: Correct.

20 MR. RUHNKE: That would lead to trial within a trial.

21 THE COURT: Hang on a second.

22 And what would the government propose as a limiting
23 instruction?

24 MR. ROTHSCCHILD: It would be the standard limiting
25 instruction that's given for 404(b) evidence. If this was

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1 being introduced -- I mean I'm a little confused by the idea
2 that intent is not being placed at issue here. There were 19
3 bags of crack recovered from the defendant's pocket in his
4 arrest in this case. If I understood defense counsel
5 correctly, they're not going to be arguing that that was
6 personal-use quantities; they're instead going to be arguing
7 that the police planted that and that never happened.

8 THE COURT: That's what he's -- they're going to argue
9 the cops are lying.

10 MR. ROTHSCCHILD: OK.

11 THE COURT: That's not what happened.

12 MR. ROTHSCCHILD: Correct. I think absence of mistake,
13 absence of error is a basis for 404(b) in that case.

14 THE COURT: But what's the mistake here?

15 MR. ROTHSCCHILD: Sorry.

16 Apologize, your Honor. I think the appropriate
17 limiting instruction would be that this is not being introduced
18 for purposes of showing propensity or his character to commit
19 crime but, instead, to show knowledge and intent, which are
20 issues the government needs to prove. And so when we show
21 evidence such as text messages of this defendant using certain
22 words, like "cars" and "soft" to explain to the jury that the
23 meaning behind those words was drugs and not something else in
24 this case.

25 THE COURT: It's relevant and it comes in for the

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1 background of the conspiracy.

2 MR. ROTHSCCHILD: Yeah, that's right.

3 THE COURT: And what about the gun; what possible
4 relevance does the gun have?

5 MR. ROTHSCCHILD: Your Honor, I think there's numerous
6 cases that refer to guns as tools of the drug trade.

7 THE COURT: Totally agree. OK. Now, get me through
8 the 403 balancing. Why isn't it more prejudicial than
9 probative given the fact that this case, the charges in this
10 case do not involve guns and don't involve drug dealing with
11 guns.

12 MR. ROTHSCCHILD: Your Honor, I'm not aware of a case
13 that says that gun evidence can only come in if guns are
14 present in the charged case. I think there's a range of
15 equipment that drug dealers use, and some of it was present in
16 the 2020 arrest and overlapping parts of that were to present
17 in the 2016 arrest too, but in the 2016 arrest he had
18 additional equipment, and it happened to be firearms.

19 THE COURT: OK.

20 Mr. Ruhnke.

21 MR. RUHNKE: Your Honor, this is a case of the tail
22 wagging the dog. We're going to have a trial within a trial.

23 THE COURT: I don't think so.

24 MR. RUHNKE: Oh, good.

25 THE COURT: Why do you think that?

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1 MR. RUHNKE: Well, because then the issue is going to
2 be was he living there, was he in possession of these items
3 that were recovered.

4 THE COURT: OK.

5 MR. RUHNKE: And you know, we may have to call
6 witnesses on those issues.

7 THE COURT: OK.

8 MR. RUHNKE: There were some references in the *Jencks*
9 material to that, and I think that the question of the guns is
10 particularly clear as a 403 basis, where the jury's being told
11 you've heard evidence of firearms dealing -- firearms recovery,
12 Mr. Burgos is not charged with dealing in firearms, but you may
13 consider this evidence on -- what? On background?

14 That just doesn't, you know -- background is just too
15 big a bucket for 404(b) evidence, and you know, the government
16 has evidence of present narcotic paraphernalia that it claims
17 it can credibly prove was in the apartment at the time of his
18 arrest, and they have that evidence. And I think it's just
19 unfair, and I don't think this trial will be a fair trial if he
20 had to defend now against a 2016 charge, and bluntly, your
21 Honor, if the district attorney who prosecuted this case had
22 any thought that Mr. Burgos had anything to do with these
23 firearms, a seventh degree drug possession charge with a
24 maximum exposure of up to one year would not have been an offer
25 in the case.

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1 THE COURT: Look, I can't speculate about what was
2 going on in the D.A.'s head.

3 MR. RUHNKE: I know, your Honor.

4 THE COURT: Let's hold on this now and go on to the
5 other issue, because they kind of go together in terms of my
6 understanding of what the evidence is going to look like as
7 presented to the jury.

8 So the fifth motion *in limine* is the issue of the
9 undercovers testifying by pseudonym. There was no objection to
10 that, so that's granted.

11 That brings us to the statements that the victim --
12 it's our dead victim, right? The guy died -- that the victim
13 made to his sister about dealing drugs with John. And how did
14 these statements, from a timing perspective, how do they sync
15 up with the 2016 seizures?

16 MR. ROTHSCHILD: Your Honor, the first set of
17 statements are from five years ago, so around 2016. I don't
18 think we know whether they're made before or after the seizure.

19 THE COURT: Around the same.

20 MR. ROTHSCHILD: But around the time, around that
21 time. That's exactly right.

22 The second set of statements come shortly before the
23 victim's death, so early 2019.

24 THE COURT: OK. Do you want to be heard on these?

25 MR. ROTHSCHILD: Your Honor, I'll rest on our papers

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1 on that one.

2 THE COURT: OK.

3 Mr. Ruhnke.

4 MR. RUHNKE: Your Honor, for any number of reasons
5 that we've tried to put before your Honor, we don't think this
6 is appropriate that we have the sister of the declarant coming
7 before the jury and saying to the jury, My brother told me that
8 he deals drugs with John. And that statement can't be
9 cross-examined, and there's a Sixth Amendment objection to it.

10 THE COURT: Again, that's always the problem with
11 dying declarations -- I'm sorry, statements against interest.

12 MR. RUHNKE: Absent witnesses.

13 THE COURT: Absent witnesses, correct.

14 MR. RUHNKE: But here's a case where the -- and the
15 argument is that somehow this is a declaration against penal
16 interests on the part of the brother.

17 THE COURT: Right.

18 MR. RUHNKE: -- a private family complaint to the
19 sister that their mother is stealing drugs and he doesn't know
20 how he's going to pay John for the drugs and the second series
21 of statements about dealing with John, the sister has no idea
22 if these statements are true or false. The witness can't be
23 cross-examined on the statements, obviously, because he's
24 absent and the very nature of them, to implicate a defendant on
25 trial by name by a witness who can't be cross-examined on a

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1 theory that somehow it's a declaration against interests or,
2 even more attenuated, a coconspirator's statement, that these
3 statements somehow furthered an ongoing conspiracy involving
4 the deceased brother and the defendant on trial.

5 And in terms of reliability, the time that's passed
6 before she told anyone about these statements is another
7 factor, I think, that weighs in there. I think it's a period
8 of five years for one group of statements and two years for the
9 next set of statements or conversations. Under just the
10 totality, I think it would be unfair. And I want to be clear.
11 It also would be a Sixth Amendment violation to allow this
12 evidence.

13 THE COURT: OK.

14 Mr. Rothschild, anything?

15 MR. ROTHSCHILD: And your Honor, just to clarify, I
16 think it was clear in what Mr. Ruhnke just said, but our read
17 is that the victim was, in fact, a coconspirator; these
18 statements are not testimonial.

19 THE COURT: The victim was a coconspirator.

20 MR. ROTHSCHILD: I'm sorry?

21 THE COURT: Hang on a second.

22 Mr. Burgos, don't make me tell you again. You have to
23 keep it above your nose. You breathe through your nose and
24 your mouth. If you've got virus, it comes out your nose.

25 MR. ROTHSCHILD: Your Honor, the statements are not

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1 made to law enforcement, is the point. These are not
2 testimonial statements that were made to law enforcement.
3 These are statements that are made to the sister.

4 THE COURT: Your allegation is the second piece, the
5 ones where he was trying to get money, he's asking his sister
6 for money to pay off the guy he bought drugs from.

7 MR. ROTHSCHILD: Correct.

8 THE COURT: Because his mother stole the drugs.

9 MR. ROTHSCHILD: That's exactly right.

10 THE COURT: Assuming that he is a coconspirator, why
11 don't you think those are within the scope of the conspiracy,
12 Mr. Ruhnke? He's looking for money to repay his dealer. That
13 furthers the conspiracy --

14 MR. RUHNKE: Because --

15 THE COURT: -- piece within the conspiracy.

16 MR. RUHNKE: Because it names Mr. Burgos.

17 THE COURT: That doesn't change whether it's a
18 coconspirator statement.

19 MR. RUHNKE: I don't think this furthers a conspiracy,
20 and I think there's an overall reliability issue.

21 THE COURT: Why isn't that appropriate for
22 cross-examination?

23 MR. RUHNKE: It would be appropriate for
24 cross-examination if it came to that, but I think it's also
25 appropriate for a 403 analysis. I think the argument that this

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1 is somehow furthering a conspiracy that Mr. Burgos is involved
2 with the decedent at the time is attenuated, and I maintain our
3 objection.

4 THE COURT: OK. I disagree. I mean I certainly agree
5 that if it were marginally relevant, that the 403 balance might
6 fall differently, but I disagree that it's marginal relevance.
7 This is an issue of whether, in fact, Mr. Burgos was part of a
8 conspiracy to deal drugs. A lot of the evidence sort of ebbs
9 and flows through text messages between the dead guy and either
10 John-no-last-name or someone talking about John. So all of
11 that, linking all of that together is going to be critical for
12 the government to be able to prove its case. So I disagree
13 that it's not coconspirator statement. I think it is
14 coconspirator statement, and it's not so attenuated that it
15 should be excluded under a 403 analysis.

16 So I'm going to allow the statements in, and that
17 brings us back to the 2016 drug sales. Because of the overlap
18 in time but for pulling it back and the conversation five years
19 ago, it would be a closer case on the 2016 search, but it seems
20 to me that that does complete the picture of what was going on
21 with Mr. Burgos. And therefore, I'm going to admit it, but I
22 am not going to admit the gun. The guns and the ammunition are
23 out. I think on a 403 analysis, it's too prejudicial given its
24 probative value, which, given the fact that you've got lots of
25 drugs in the apartment, is almost none. So the guns and ammo

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1 are out. The drugs and other drug paraphernalia are in.

2 OK.

3 MR. ROTHSCILD: Your Honor, I apologize for
4 interrupting.

5 Just to clarify, are you admitting both sets of
6 statements as we have defined them in the motion?

7 THE COURT: Yes.

8 MR. ROTHSCILD: OK.

9 THE COURT: Yes.

10 MR. ROTHSCILD: Thank you, your Honor.

11 THE COURT: That's it for the *in limine* motions.

12 Mr. Ruhnke filed a motion on Sunday for sanctions.

13 Has that been worked out between the parties that
14 there's now an understanding of what happened?

15 MR. RUHNKE: It has been worked out between the
16 parties, apparently a misunderstanding. And just that the way
17 it was written in the *Jencks* material is a red flag to defense
18 attorneys.

19 THE COURT: Understood.

20 MR. RUHNKE: And I will say also, your Honor, I came
21 across another example of an even more direct reference in 3500
22 materials "do not discuss this with anyone," and the government
23 explained to me, Well, that's just their way of saying don't
24 talk to other witnesses about it; it's a way of saying we
25 didn't say what we said. So it's been worked out, is the

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1 answer.

2 THE COURT: Good. OK. All right. So the motion for
3 sanctions is denied as moot.

4 MR. RUHNKE: It's withdrawn, your Honor.

5 THE COURT: It's withdrawn. Fine.

6 I think we signed off on Mr. Ruhnke's request to be
7 able to bring laptops in. The government can bring your
8 laptops in. Just remember to bring a copy of the order with
9 you to facilitate you getting through the guards.

10 MR. RUHNKE: Yes, your Honor. Thank you.

11 THE COURT: Was there a plea offer made in this case?

12 MR. ROTHSCHILD: Your Honor, I don't believe a written
13 plea offer was ever extended, but I believe that plea
14 discussions were had with defense counsel and the -- we
15 verbally conveyed what the plea would be, which in this case
16 would be that it's a plea to the (b)(1)(C). That offer was
17 made verbally by prior government counsel.

18 THE COURT: All right.

19 MR. RUHNKE: In fact, there was a written plea offer
20 advanced by prior government counsel and discussed with the
21 client. And we're prepared to go to trial, your Honor. That's
22 the answer to that.

23 THE COURT: OK.

24 Mr. Burgos, did your lawyer tell you that the
25 government had made a plea offer to you?

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1 THE DEFENDANT: Yes.

2 THE COURT: And did you discuss it with your lawyer?

3 THE DEFENDANT: Yes.

4 THE COURT: Was it your decision to go to trial?

5 THE DEFENDANT: Yes.

6 THE COURT: OK.

7 All right. I think we've gotten the 3500 list and
8 exhibit list from the government. Is that correct?

9 MR. ROTHSCILD: That's correct, your Honor.

10 THE COURT: Perfect.

11 MR. ROTHSCILD: The 3500 material's been provided to
12 the Court and an index will be sent separately.

13 THE COURT: All right. Anything further?

14 I'm done with my agenda. Does the government have any
15 questions?

16 MR. ROTHSCILD: One moment, your Honor?

17 THE COURT: Sure.

18 MR. ROTHSCILD: Nothing further from the government,
19 your Honor. Thank you.

20 THE COURT: Anything from the defense?

21 MR. RUHNKE: No, just to advise your Honor that the
22 parties have been working cooperatively on drafting
23 stipulations.

24 THE COURT: Good.

25 MR. RUHNKE: And hopefully that will go smoothly.

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1 THE COURT: Are there definitely going to be some
2 stipulations?

3 MR. ROTHSCCHILD: Yes, there will be, your Honor.

4 THE COURT: OK. Are there going to be summary charts?

5 MR. ROTHSCCHILD: There will be, your Honor, yes.

6 THE COURT: Both that are coming into evidence and
7 those that are just used as an aid to the jury, or one or the
8 other or both?

9 MR. ROTHSCCHILD: I believe both, your Honor, certainly
10 that are coming in as evidence. What was submitted today to
11 the Court as Government Exhibit 400 is an example of a chart
12 that is in evidence.

13 THE COURT: OK.

14 I'm trying to think of some more issues for the final
15 charge.

16 Is anything redacted?

17 MR. ROTHSCCHILD: In the exhibits?

18 THE COURT: Yes.

19 MR. ROTHSCCHILD: I don't believe so, your Honor, no.

20 THE COURT: OK.

21 Anything else?

22 MR. ROTHSCCHILD: Your Honor, just to clarify, some of
23 the 3500 material in the case has been redacted so to the
24 extent the defense seeks to introduce that as an exhibit,
25 there's redactions on some of that material, but nothing that

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1 the government intends to put forth in its exhibit list.

2 THE COURT: OK. That's unlikely to come into
3 evidence, but you never know, I guess.

4 All right. Anything further?

5 Assume that we're going to do a charge conference on
6 Tuesday night of the trial. We'll get you the charge, we'll
7 get you the draft charge maybe by the end of this week based on
8 my assumptions of what the trial's going to look like. We'll
9 put brackets if there are things that I just don't know whether
10 it's going to become an issue or not. OK?

11 MR. RUHNKE: Yes, your Honor.

12 MR. KROUSE: If acceptable to the Court, I'll be
13 handling the charge conference. That will probably be my only
14 speaking role at trial.

15 THE COURT: OK. So, you're the second seat.

16 You guys are going to be the main. How long is your
17 opening going to be, do you know? Who's opening?

18 MR. ROTHSCILD: I am, your Honor. Not long. I can't
19 imagine it would be more than ten minutes.

20 THE COURT: OK.

21 Mr. Ruhnke, about the same for you?

22 MR. RUHNKE: About the same, your Honor, maybe a
23 little longer. Ten minutes is an awfully short time.

24 THE COURT: OK. You should definitely have a witness
25 available, one or two even, for Monday because we presumably

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1 will get there.

2 OK. Thanks, everybody. See you Monday. Please be in
3 the courtroom by 9:45, no later.

4 MR. RUHNKE: Thank you, your Honor.

5 (Adjourned)